Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2002

KONSKI ENGINEERS, P.C., and JAMES L. KONSKI, P.E.,

Petitioners-Petitioners,

— *vs.* —

ARTHUR LEVITT, COMPTROLLER, STATE OF NEW YORK, and NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents-Respondents,

ERDMAN, ANTHONY, ASSOCIATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

John F. Lawton, on behalf of Petitioners, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above case on March 20, 1980.

OPINIONS BELOW

The opinions of the Supreme Court, Albany County, dated November 16, 1977 and April 5, 1978 are not reported. The opinion of the Appellate Division, Third Department, is reported at 69 A.D.2d 940, 415 N.Y.S.2d 509. The opinion of the Court of Appeals of the State of New York is reported at 49 N.Y.2d 850, N.Y.2d .

JURISDICTION

The judgment of the Court of Appeals of the State of New York was made and entered on March 20, 1980, and a copy thereof is appended to this petition in the Appendix at p. A1. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether mere issuance of a subpoena duces tecum for the production of books and records of a corporation before a Grand Jury is a sufficient basis to exclude a person from being eligible to perform work under a contract with the State?

2. Whether the Comptroller's refusal to approve Warner Dam Contract II awarded to Konski by DEC, and the subsequent *de facto* debarment of Konski from performing contract work for the State, absent any hearing or notification of any charges against said firm, violate that clause of Section 1, Amendment XIV of the Constitution of the United States which states: "Nor shall any State deprive any person of life, liberty, or property without due process of law"?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the U. S. Constitution, Amendment XIV, Section 1, which states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

This case also involves the following statutes:

N.Y. State Fin. Law §112(2) (McKinney 1974)

> "2. Before any contract made for or by any state department, board officer, commission, or institution, shall be executed or become effective, when such contract exceeds one thousand dollars in amount, or before any contract made by a railroad corporation for grade-crossing eliminations shall be executed or become effective, when such contract exceeds two thousand dollars in amount, or before any contract made by any state department, or officer thereof, for the repair of state aircraft shall be executed or become effective, when such contract exceeds two thousand dollars, or before any contract made by the commissioner of transportation relating to real property acquisition shall be executed or become effective, when such contract exceeds two thousand five hundred dollars in amount, it shall first be approved by the comptroller and filed in his office. Whenever any liability of any nature shall be incurred by or for any state department, board, officer, commission, or institution, notice that such liability has been incurred shall be immediately given in writing to the state comptroller."

N.Y. State Fin. Law §139-b (McKinney 1974)

> "Any person who, when called before a grand jury, head of a state department, temporary state commission or other state agency, or the organized crime task force in the department of law, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation, concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state of of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with the state or any public department, agency or official thereof, for goods, work or servies, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred thirty-nine-c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, or the organized crime task force in the department of law before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the state commissioner of transportation, except in the event the investigation concerns a public building transaction or contract said notice shall be sent to the state commissioner of general services, and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein."

N.Y. State Fin. Law §139-c (McKinney 1974)

"1. Any firm, partnership or corporation which has become subject to the cancellation or termination of a contract or disqualification to contract on account of the refusal of a member, partner, director or officer thereof to waive immunity when called to testify, as provided in sections one hundred thirty-nine-a and one hundred thirty-nine-b of this article, may, upon ten days' notice to the attorney general and to the officer who conducted the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission

or other state agency, or the organized crime task force in the department of law in which the refusal occurred, commence a special proceeding at a special term of the supreme court held within the judicial district in which the refusal occurred for an order discontinuing the disqualification. The petition shall set forth grounds, including that the cooperation by petitioner with the grand jury or other body which conducted the investigation at the time of the refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or corporation by the member, partner, officer or director who refused to waive immunity is such, that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification, as provided in sections one hundred thirty-nine-a and one hundred thirty-nine-b of this article.

A copy of the petition and accompanying papers shall be served with the notices to be given pursuant to this subdivision.

2. Upon the filing of such petition the court may stay as to petitioner, pending a decision upon the petition, the cancellation or termination of any contracts resulting from such refusal upon such terms as to notice or otherwise as may be just.

3. At least two days prior to the return day, the officer who conducted the investigation before the grand jury or other body and the attorney general may file answers to the petition or move for judgment dismissing the petition as a matter of law. On or before the return day the petitioner may file a reply to the answer.

4. Upon the return day the court may, upon the petition and answer and other papers filed, forthwith render such judgment as the case requires, or if a triable issue of fact is duly raised, it shall forthwith be tried before a court sitting without a jury or before a referee. The provisions of statute or rule governing references in an action shall apply to a reference under this subdivision.

5. The court shall render judgment dismissing the petition on the merits or discontinuing the disqualification upon the ground that the public interest would be served by its discontinuance, and granting such other relief as to the cancellation or termination of contracts as may be appropriate, but without costs to petitioner."

N.Y. Crim. Proc. Law §610.10 (McKinney 1971)

"1. Under circumstances prescribed in this article, a person at liberty within the state may be required to attend a criminal court action or proceeding as a witness by the issuance and service upon him of a subpoena.

2. A 'subpoena' is a process of a court directing the person to whom it is addressed to attend and appear as a witness in a designated action or proceeding in such court, on a designated date and any recessed or adjourned date of the action or proceeding. If the witness is given reasonable notice of such recess or adjournment, no further process is required to compel his attendance on the adjourned date.

3. As used in this article, 'subpoena' includes a 'subpoena duces tecum.' A subpoena duces tecum is a subpoena requiring the witness to bring with him and produce specified physical evidence."

N.Y. Crim. Proc. Law §610.20 (McKinney 1971)

"1. Any criminal court may issue a subpoena for the attendance of a witness in any criminal action or proceeding in such court.

2. A district attorney, or other prosecutor where appropriate, as an officer of a criminal court in which he is conducting the prosecution of a criminal action or proceeding, may issue a subpoena of such court, subscribed by himself, for the attendance in such court or a grand jury thereof of any witness whom the people are entitled to call in such action or proceeding.

3. An attorney for a defendant in a criminal action or proceeding, as an officer of a criminal court, may issue a subpoena of such court, subscribed by himself, for the attendance in such court of any witness whom the defendant is entitled to call in such action or proceeding. An attorney for a defendant may not issue a subpoena duces tecum of the court directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof. Such a subpoena duces tecum may be issued in behalf of a defendant upon order of a court pursuant to the rules applicable to civil cases as provided in section twenty-three hundred seven of the civil practice law and rules."

N.Y. Crim. Proc. Law §190.25 (McKinney 1971 & Supp. 1979)

"1. Proceedings of a grand jury are not valid unless at least sixteen of its members are present. The finding of an indictment, a direction to file a prosecutor's information, a decision to submit a grand jury report and every other affirmative official action or decision requires the concurrence of at least twelve members thereof.

2. The foreman or any other grand juror may administer an oath to any witness appearing before the grand jury.

3. During the deliberations and voting of a grand jury, only the grand jurors may be present in the grand jury room. During its other proceedings, the following persons, in addition to witnesses, may, as the occasion requires, also be present:

(a) The district attorney;

(b) A clerk or other public servant authorized to assist the grand jury in the administrative conduct of its proceedings;

(c) A stenographer authorized to record the proceedings of the grand jury;

(d) An interpreter. Upon request of the grand jury, the prosecutor must provide an interpreter to interpret the testimony of any witness who does not speak the English language well enough to be readily understood. Such interpreter must, if he has not previously taken the constitutional oath of office, first take an oath before the grand jury that he will faithfully interpret the testimony of the witness and that he will keep secret all matters before such grand jury within his knowledge;

(e) A public servant holding a witness in custody. When a person held in official custody is a witness before a grand jury, a public servant assigned to guard him during his grand jury appearance may accompany him in the grand jury room. Such public servant must, if he has not previously taken the constitutional oath of office, first take an oath before the grand jury that he will keep secret all matters before it within his knowledge;

(f) An attorney representing a witness pursuant to section 190.52 of this chapter while that witness is present.

4. Grand jury proceedings are secret, and no grand juror, other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding. For the purpose of assisting the grand jury in conducting its investigation, evidence obtained by a grand jury may be independently examined by the district attorney, members of his staff, police officers specifically assigned to the investigation, and such other persons as the court may specifically authorize. Such evidence may not be disclosed to other persons without a court order. Nothing contained herein shall prohibit a witness from disclosing his own testimony.

5. The grand jury is the exclusive judge of the facts with respect to any matter before it.

6. The legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it, and such instructions must be recorded in the minutes."

STATEMENT OF THE CASE

On December 18, 1975, the New York State Department of Environmental Conservation (hereinafter "DEC") wrote to numerous engineering firms requesting the submission of proposals for consulting engineering services " . . . for the design of rehabilitation, improvements and related channel work to Warner Dam, City of Jamestown, Chautauqua County, New York." The letter noted that this engineering work was to be administered under three consecutive contracts. Contract I involved an "investigation of the existing dam, . . . determination of need for (certain specified) channel excavation, . . ." and "preparation of proposal for either rehabilitation of dam or construction of a new structure." Contract I was also to include the drafting, with DEC approval, of the specifications governing the consulting engineers' work on Contract II. Contract II was then to cover "preparation of plans and specifications for dam rehabilitation or construction" while Contract III involved the design of necessary road construction and certain channel improvements. Finally, the letter noted that "it is possible that DEC may wish to negotiate with *the consultant* for cont ct supervision and inspection of all or a portion of the work," (emphasis supplied).

Given the interrelated and continuing nature of the engineering tasks to be performed under the three contracts and the obvious advantage in efficiency and resultant cash savings, the DEC request for proposals for Contract I advised that the successful bidder on said contract would be expected to perform the second and third contracts as well:

> " . . . it is anticipated that cost plus fixed fee contracts would be negotiated with the selected consultant (of Contract I) for the additional work following the completion of Contract I."

In early March, 1976, Konski Engineers, P.C. (hereinafter "Konski") was awarded Warner Dam Contract I after having submitted the lowest bid. On March 18, 1976 Konski submitted a final draft contract for execution by various DEC

officials, "approval as to form" by the State Attorney General's Office, and "approval" by the State Comptroller. The signatures of all these officials were not in fact obtained until June 23, 1976, more than three months after the contract was executed by James L. Konski as President of petitioner. However, due to the urgency of the work involved, and at the request of local government agencies and DEC personnel, Konski commenced and actually completed a majority of its work under Contract I prior to the completion of the State's formal approval procedure. For this reason, Konski submitted the report required under Contract I less than one month thereafter.

After judging Konski to have successfully completed Contract I, DEC awarded Contract II to Konski and sent Konski a copy of its signature on February 25, 1979, stating:

> "It requires approximately six weeks for the state to execute a contract. *We* will forward one copy of the executed contract to you," (emphasis supplied).

James L. Konski signed and returned said contract for Konski Engineers, P. C. on March 1, 1977. Again, during April, May and June, in response to requests of numerous local officials and DEC personnel, Konski started the job prior to final contract execution. DEC involvement with Konski's Contract II work during this period is evidenced by a letter of June 6, 1977 wherein, while noting a delay in obtaining the last state official's signature, *i.e.* the Comptroller's "approval" of the contract, and requesting a delay in subcontract execution until such formal approval was obtained, DEC stated:

> "We also appreciate the schematics of the new dam proposals (Contract II work). *We do wish to pursue* the three-taintor-gate design, as this design would have an economic advantage to local interest," (R. 71, emphasis supplied).

Thus, on June 6, 1977, DEC was treating Contract II as an already established contractual relationship.

During this period, however, DEC was actually engaged in a bureaucratic battle with the State Comptroller's Office on the subject of DEC's award of Warner Dam Contract II to Konski. On June 21, 1976, the Comptroller had been served with a subpoena duces tecum by Robert M. Morgenthau, District Attorney of New York County, to produce all documents in his possession concerning Konski. On June 24, 1976, just one day after the Comptroller had "approved" Contract I, the Comptroller delivered such documents. Then on May 28, 1977, Peter D. Andreoli, Special Deputy Attorney General, informally requested similar information from the Comptroller. Following this request, Theodore Spatz, Counsel to the Comptroller, attempted to persuade DEC to rescind its award of Contract II to Konski. As leverage, Mr. Spatz, "on one or more occasions during each of May and June of 1977, . . . advised the Department of Environmental Conservation that the Comproller would not approve award of the proposed contract to Konski Engineers." Mr. Spatz also ". . . advised the Department of Environmental Conservation that Konski Engineers was under a Grand Jury investigation."

Finally, the Comptroller forced DEC's hand by communicating its final refusal to approve the contract. By letter of July 11, 1977, DEC told Konski that:

> "We have been informed that *your* contract for design of a replacement structure for Warner Dam will not be approved by Audit and Control. In order to take advantage of the available Federal funding necessary for construction we must solicit proposals from other engineering concerns at this time," (emphasis supplied).

By this date, Konski had performed services under Contract II worth $23,690.17 under the cost plus fixed fees formula therein.

On July 18, 1977, James L. Konski himself was served with a subpoena duces tecum issued by the Extraordinary Special Grand Jury of the County of Onondaga which demanded production of virtually all Konski business records for transactions

occurring between January 1, 1971 and January 1, 1974. Konski delivered all the documents requested. To date Konski has fully cooperated with the Special Deputy Attorney General's Office. No indictments have been issued; indeed no further informational requests have been made since the initial requests in the summer of 1977. Konski has never been charged with, and throughout these proceedings has uncategorically denied, any wrongdoing whatever. Indeed, as a professional engineering firm which had been doing business with the State for over twenty-five years, no question had ever been raised as to the adequacy of Konski's contract performance or its honesty or integrity.

Immediately following receipt of the July 11, 1977 refusal letter, Konski stopped all work on Contract II and began an effort to determine the reason for said refusal, but to no avail. As James L. Konski stated under oath in his petition which commenced these proceedings:

> "Numerous attempts to ascertain the reason for the failure of Audit and Control to approve the contract, in contacts effected by legal representatives of Konski Engineers, P.C. with DEC and the Comptroller's Office have, to date, met with no results"

Indeed, prior to July 18, 1977, Konski had no idea that any investigating body had sought its records from anyone or that such action was the basis of the Comptroller's refusal to approve Contract II. And, as Konski was given no opportunity by the Comptroller to respond to any charges against him, he was forced to commence an Article 78 proceeding to gain judicial review of the Comptroller's action, to compel the Comptroller's approval of the award of Contract II to Konski and to enjoin the commencement of an illegally awarded replacement contract.

Even as of the date of commencement of the Article 78 proceeding which is the subject of this petition, the Comptroller's Office refused to acknowledge the relationship between the

Andreoli records request and the Comptroller's refusal to approve the Konski contract. Instead, rather than answering the Article 78 petition, the Comptroller moved to dismiss, the Assistant Attorney General arguing for the Comptroller that "no (judicial) . . . review of this decision is proper given the circumstances that this is a negotiated contract and the awarding agency may determine to give the contract to whichever company it chooses."

Thus, a hotly disputed issue at the oral argument on appellant's first attempt to block this award of Contract II to another contractor, on October 28, 1977, was whether the State could properly forever withhold from petitioner the reason for the Comptroller's refusal. It was not until Judge Cobb denied the State's motion to dismiss and ordered the Comptroller to answer the Article 78 petition and produce relevent documents that the Comptroller finally explained his actions, *i.e.* on November 16, 1977, more than four months after Konski's receipt of the refusal letter. Judge Cobb also upheld Konski's right to judicial review of the Comptroller's action, but denied mandamus and injunctive relief without prejudice, pending further discovery by Konski, due to " . . . the reluctance of the courts to delay urgent public projects."

Following said discovery, the State filed an affidavit of Theodore Spatz, Counsel to the Comptroller, in support of the Comptroller's action challenged herein. This affidavit acknowledged that the Andreoli investigation was the sole reason for the Comptroller's refusal to approve the Konski contract and indicated that said refusal, absent judicial intervention, would be repeated *each and every time* a State executive agency sent a Konski contract to the Comproller's Office for award approval:

> "Approval of *such* a negotiated contract by the Comptroller after he is on notice that a criminal investigation involving this contractor is *ongoing* and involved the *alleged* political contributions could result in undermining the confidence the public must place in the Comptroller as an impartial guardian of State expenditures,"

Although the Assistant Attorney General maintained that the Comptroller's action related only to Warner Dam Contract II, the State nowhere explained in the record below how the cloud that Mr. Spatz declared to threaten "the award and performance of the contract at question" would dissipate at any time prior to the conclusion of the Andreoli investigation. The role of the Comptroller as a "fiduciary" with respect to "community interest" would not permit the Comptroller, according to Mr. Spatz, to award a contract to Konski until it was "certain" that the results of the investigation would not interfere with the timely completion thereof. Thus, without any administrative hearing whatever, Konski was faced with *de facto* debarment from performing any contractual work for the State for perhaps years to come, even though an indictment might never be returned against said firm, or even though it might prove its innocence of any wrongdoing.

Thus, on the above facts, in memoranda and briefs at every stage of the proceedings in state court below, petitioner argued that the Comptroller's action violated due process of law, and for this and other reasons was arbitrary and capricious. Petitioner also maintained that the Comptroller's action was beyond his legal authority under New York State Finance Law Section 112.

After another hearing, Judge Casey refused injunctive relief but issued a declaratory judgment that the Comptroller's refusal to approve the Konski contract was arbitrary and capricious and awarded Konski damages, the amount to be ascertained at Trial Term of the State Supreme Court. In so doing, Judge Casey held that:

> "The petitioners were not the primary target of the investigation. Indeed, the information requested of them was not indicative of any serious dereliction by the petitioners nor did it indicate a substantial likelihood of discovering such conduct. This inconclusive information pales when matched against petitioners' unblemished conduct, their previous satisfactory performance of Contract I and their partial performance of Contract II."

Given this holding, Judge Casey did not reach the due process issue in his decision.

On appeal, the Appellate Division, Third Department, reversed Judge Casey's order, holding the Comptroller's approval of the contract to be a condition precedent to any State liability to Konski, rejecting the contention that the Comptroller abused his authority in refusing to approve the contract, and holding that there was a "rational basis for said refusal." On appeal from the order of reversal, the New York Court of Appeals issued a one sentence memorandum decision affirming the Appellate Division's order for the reasons stated in said lower court's decision. Again, neither of these appeals courts directly ruled on petitioner's due process claims.

REASONS FOR GRANTING WRIT

The authority relied upon by the Comptroller in refusing to approve the contract at issue herein, New York State Finance Law Section 112(2), states simply that:

> "Before any contract made for or by any state department . . . shall be executed *or become effective* . . . it shall first be approved by the comptroller and filed in his office," (emphasis supplied).

As noted above, Konski was the low bidder on Contract I, and, given the nature of the three Warner Dam contracts to be issued, the State had declared at the outset that the remaining contracts would be let to the consulting engineering firm awarded the first contract. As expected, Contract II was awarded to Konski by DEC and fully executed by DEC officials. Only then did the Comptroller render it "ineffective" by his refusal to grant his approval. DEC officials persuaded Konski to begin work prior to this approval and acted at all times prior to July 11, 1977 as if a contractual relationship existed between the State and Konski. This same pressure for pre-approval commencement of work, and significant pre-approval contractual performance had also occurred following the award of Contract I, which also was not fully approved

until months after Konski's execution thereof. Thus, Konski fully believed that Contract II would also be approved.

In this regard, New York Attorney General Woodbury, in delineating the scope of the Comptroller's legal authority under State Finance Law Section 112(2), noted at 1915 *Op. Atty. Gen.* 28, 31, that while the Comptroller could refuse contract approval on the basis of a lack of appropriated funds, bidding irregularities or extravagant cost:

> "He (the Comptroller) should keep in mind that *he is not one of the contracting parties; that the power of making contracts is not taken away from authorized officers and agents of the State by force of this amendment; (and that) . . . his power is not to be exercised to prevent the execution of the proper functions of other officers and agents of the state,*" (emphasis supplied).

It is clear that Konski had a reasonable expectation of a contract which has long been considered a property right subject to judicial protection under New York law. *See, e.g. Hardy* v. *Erickson*, 36 N.Y.S.2d 823 (Sup. Ct., Spec. Term, N.Y. Co. 1942) and *Royal Farms, Inc.* v. *Minute Maid Co.*, 37 Misc. 2d 875 (Spec. Term, Kings Co. 1962). Certainly under these circumstances, Konski's belief that its contractual relationship with the State would be duly formalized, constituted much more than just a "unilateral expectation" that it would continue on as the consulting engineer on the Warner Dam project. *See Board of Regents* v. *Roth*, 408 U.S. 564 92 S. Ct. 2701 (1972).

In addition, while the awarding procedure herein was not through advertised bids, which must be awarded to the lowest responsible bidder under State law, Contract II had *already been negotiated and awarded* when the Comptroller refused approval. Thus, the decision of the Supreme Court of Louisiana in *Haughton Elevator Division* v. *State of Louisiana*, 367 So.2d 1161 (La.1979) involving the right of the lowest responsible bidder *to be awarded* the contract bid upon, is directly relevant to the case at bar. Therein, the court enjoined the state from awarding the subject contract to a replacement contractor until due process had been afforded

Haughton by the awarding agency which had disqualified it as a "nonresponsible contractor."[1] Said the court;

> "An awarding authority which intends to disqualify a bidder must, *prior to the* award of the contract, give the bidder formal notice in writing that the authority is considering disqualifying the bidder from competing for the contract. This notice should specify the reasons for the proposed disqualification. The notification should contain specific language which puts the bidder on notice that the authority is considering disqualification . . . .
>
> The bidder must be given the opportunity to respond to the charges in writing and, in all cases in which feasible, the bidder should have the opportunity to meet with officials of the awarding authority to discuss the charges against the bidder and his response thereto.
>
> After this informal hearing, but before the award of the contract, the awarding authority must give the bidder formal written notice he has been disqualified from competing for the contract. This notice should list the specific reasons upon which the disqualification is based, . . .
>
> The "records" of this disqualification proceeding must be preserved so as to form the basis for any subsequent judicial review which might be sought by the bidder."

No such notice or opportunity to respond to specific charges was granted Konski prior to the Comptroller's action.

Further, the Comptroller's refusal to approve Warner Dam Contract II had an impact far greater than the loss of one contract and the cost of already completed performance thereon. Rather, it constituted a *de facto* debarment from all State contracting while the so-called investigation of Konski was "ongoing".

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1 Here, Dec refused to withdraw its award of Contract II to Konski unilaterally. Thus, the awarding agency *refused to determine* that a subpoena or informal request by the Special Attorney General for Konski documents rendered said firm not responsible.

Such a suspension of a firm from contracting with the government while the firm was "being investigated" was also at issue in *Art-Metal-USA, Inc.* v. *Soloman*, 473 F. Supp. 1 (D.D.C. 1978). Therein, as here, Art-Metal was not notified of any specific charges against it nor given the opportunity to rebut such charges. In issuing an injunction against the debarment, the court held:

> " . . . it is clear at the outset that due process of law requires that before a contractor may be blacklisted (whether by debarment or suspension) he must be afforded specific procedural safeguards, including, *inter alia*, a notice of the charges against it, an opportunity to rebut those charges and, under most circumstances, a hearing."

In reaching this conclusion, the District Court in *Art-Metal* cited *Gonzales* v. *Freeman*, 334 F. 2d 570, 579 (D.C.Cir. 1964). *Gonzales* involved a challenge to a debarment from participation in certain contracts with the Commodity Credit Corporation. Again, no specific charges were related to the persons involved, "no hearing was held, no evidence recorded, no findings were made." *Id.* And while the court overturned the debarments based upon the Administrative Procedure Act requirements, the court also noted that:

> ". . . we cannot agree that Congress intended to authorize such consequences without regulations establishing standards and procedures and without notice of changes, hearings, and findings pursuant thereto. Absent such procedural regulations and absent notice, hearing and findings in this case, the debarment is invalid; *to reach any other conclusion would give rise to serious constitutional issues* . . .
>
> What seems clear is that since the summary final action here was not authorized by statute or governed by regulation, *the challenged debarment action could not lawfully be taken without safeguards which satisfy the demands of fairness*," (emphasis supplied).

See also Rudin v. *Campbell*, 64 A.D.2d 827, 407 N.Y.S. 2d 833 (4th Dept. 1978). Here, while the Court of Appeals ruled that the Comptroller was authorized to refuse to approve one

specific contract, it did not rule on the Comptroller's legal authority to use its refusal power to effect a *de facto* debarment from state contracts. In addition, no regulations whatsoever exist governing such actions.

The New York State Finance Law, which sets forth the legal authority of the Comptroller, includes only one section delineating a procedure for disqualifying a firm from contracting with the State, State Finance Law Section 139-b. Thereunder, a person may be "disqualified from . . . selling to or submitting bids to or receiving awards from or entering into any contracts with the state," or any agency thereof, if, when compelled to testify before a grand jury, he ". . . refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer."[2] However, even when such a refusal occurs, the legislature has determined that disqualification may not take place for at least ten days, granting the refusing party time to commence a special proceeding to determine ". . . whether the questions in response to which the refusal occurred were relevant and material to the inquiry."

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[2] While that part of State Finance Law Section 139 permitting disqualification from state contracting for refusal to waive immunity *and* testify before a Grand Jury has been declared unconstitutional in *Turley* v. *Lefkowitz*, 342 F. Supp. 544 (W.D.N.Y. 1972) *aff'd* 414 U.S. 70, 94 S. Ct. 316 (1973), as a violation of the right against self-incrimination, a refusal to testify after having been granted immunity may still lead to disqualification under said statutory provision.

Further, under the State Finance Law Section 139-c, a disqualified party may commence a special proceeding to remove said disqualification upon a showing ". . . that the cooperation by petitioner with the grand jury . . . is such that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification . . .". Finally, the statute read that:

> "Upon the filing of such petition (to remove a disqualification) the court may stay as to petitioner, rendering a decision upon the petition, the cancellation or termination of any contracts resulting from such refusal . . ." *Id.* subsection 2.

Thus, the only section of the State Finance Law which grants the Comptroller discretion to disqualify a prospective contractor permits a party actually called to testify before the Grand Jury infinitely more rights to defend himself than were afforded Konski. The guidelines provided in Section 139 do not permit the *Comptroller* to delve into questions of guilt or innocence. The Comptroller is limited to a determination based solely upon the degree of cooperation tendered the Grand Jury by a prospective contractor. These guidelines were all ignored by the Comptroller in the case at bar.

The libery interest protected by the Fourteenth Amendment is the interest an individual has in being free to move about, live and practice his profession without an unjustified label of infamy. *Board of Regents* v. *Roth*, 408 U.S. 564, 572, 92 S. Ct. 2701 (1972). This court has long held that when the government takes an action which seriously injures a person's ability to make a living and his good name, reputation, honor and integrity,

due process requires that the person be notified of the charges raised against him and be afforded an opportunity to respond thereto. *Board of Regents, supra; Wisconsin* v. *Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 510 (1972). *See* also *Fitzgerald* v. *Mountain Laurel Racing, Inc.*, 464 F. Supp. 263 (W.D. Pa. 1979); *Giordano* v. *Roudebush*, 448 F. Supp. 899, 904-906 (S.D. Iowa 1977); *McNight* v. *Southeastern Pennsylvania Transportation Authority*, 583 F. 2d 1229, 1235-37 (3rd Cir. 1978); *Love* v. *Sessions*, 568 F. 2d 357, 360 n.6 (5th Cir. 1978); *McGhee* v. *Draper*, 564 F. 2d 902 (10th Cir. 1977).

The circumstances of the Comptroller's refusal to approve any and all State contracts awarded to Konski cast doubt upon his honesty and professional integrity, and constituted an unwarranted stigma upon his reputation. The Comptroller admits it advised the DEC that Konsko was "under a Grand Jury investigation" and that the Grand Jury probe "involved political corruption in the award of public contracts".[3] In denying approval of the contract already awarded by the DEC, the Comptroller took the position that the "possible outcome" of the investigation as well as the investigation itself cast a cloud over the award and performance of the contract in question.

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3 See discussion below showing that the mere issuance of a subpoena duces tecum is not any evidence whatever, under New York State Law, that the person or firm from whom the documents are demanded is "under investigation".

In addition, by reletting Contract II to a firm which Konski had originally underbid, and pursuant to precisely the same specifications originally controlling the award to Konski, the Comptroller announced to all firms involved in the rebidding process that its refusal to approve the Konski contract was not due to factors of cost, funding or improper bidding procedures by DEC. In this manner, all these competitors of Konski were clearly informed that the Comptroller questioned Konski's responsibility as a contractor.

Thus, the Comptroller actually published the "information" so damaging to Konski's reputation *Bishop* v. *Wood*, 426 U.S. 341 (1976). Konski has consistently and vehemently denied any wrongdoing on his part and has further denied that he or his company was the subject or target of the investigation, as suggested by the Comptroller. *Codd* v. *Velger*, 429 U.S. 624, 97 S. Ct. 882 (1977).

Further, the instant case is clearly distinguishable from *Paul* v. *Davis*, 424 U.S. 693, 96 S. Ct. 1155 (1976), in that Konski does not allege an injury to reputation unconnected with "some more tangible inerest." (*Id.* at 701). Rather, constitutional significance attaches to Konski's claim precisely because the "badge of infamy" placed upon his professional integrity was attended by a foreclosure of other employment opportunities by the State. *Cafeteria & Restaurant Workers, Local 43* v. *McElroy*, 367 U.S. 886, 81 S. Ct. 1743 (1961).

Again, it is significant that Konski was not merely denied two particular contracts with the State. In effect, Konski was stigmatized throughout the entire State government so long as the Comptroller felt there was a "cloud" over him as

the result of any pending investigation, regardless of the target. It is clear from the record that the Comptroller insisted upon the right to disapprove already awarded contracts whenever he is put on notice of a criminal investigation "involving" a contractor. In this vein, this court, in denying a teacher relief in *Board of Regents* v. *Roth, supra*, based its holding on the fact that the State had not invoked:

> ". . . any regulations to bar the respondent from all other public employment in state universities. *Had* it done so, this, again, would be a *different case*." (*Id.* at 408 U.S. 574-575, 92 S. Ct. 2707, emphasis supplied).

It is well established under New York law that even a probationary or provisional employee who has no property right in a particular position is entitled to a "name clearing hearing" if that person's "good name, reputation, honor, or integrity is at stake because of what the government is doing to him" *Braithwaite* v. *Manhattan Children's Psych. Ctr.*, 70 A.D.2d 810, 417 N.Y.S.2d 485 (1st Dept. 1979).

New York law, then, clearly recognizes and protects one's reputation as an interest apart from that recognized by State tort law. And this court has ruled that once such a substantive right has been conferred by the State, failure to provide a hearing constituted a denial of due process in violation of the Fourteenth Amendment. *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S. Ct. 1633 (1974). Thus, even if Konski had no property interest in the two subsequent contracts, or in obtaining future State contracts, he was entitled at least to a "name clearing hearing".

As a civil engineering firm whose contracts with the State comprised a significant percentage of its business, Konski had a clear and tangible interest in obtaining future State contracts. Yet, the likelihood of his obtaining State contracts in the future was summarily thwarted by the Comptroller's unilateral decision to refusal approval of all contracts awarded to Konski. Such action clearly must have effect upon any contract awarding agency of the State. The fact that Konski was not barred from the practice of his profession altogether, and that he might still continue to practice his profession without State contracts is not controlling on the issue of whether a tangible interest has been impaired along with Konski's reputation. *Huntley* v. *Community School Board of Brooklyn*, 543 F. 2d 979, 984-985 (2d Cir. 1976). As observed by this court in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 71 S. Cr. 624 (1953):

> "To be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government so dominates the field of opportunity (*Id.* at 185)."

Other jurisdictions as well have recognized that the loss of future employment opportunities coupled with a stigma attached to a person's reputation as a result of State action "amounts to a foreclosure of opportunities reaching the level of a 'liberty' interest to be afforded constitutional protection through due process." *Larry* v. *Lawler*, 605 F. 2d 954 (7th Cir. 1978); *see* also *Colaizzi* v. *Walker*, 542 F. 2d 969 (7th Cir. 1976); *Edelberg* v. *Illinois Racing Board*, 540 F. 2d 279 (7th Cir. 1976).

In short, Konski suffered damage to his reputation in connection with damage to some other

tangible and substantial interest, which interest is recognized and protected by New York State law. Even if Konski's interest in future State contracts does not constitute a property interest, it is clearly a tangible interest. The conjunction of damage to a tangible interest along with a stigma to reputation is sufficient to constitute unconstitutional deprivation of a liberty interest where due process is not observed. Moreover, the Comptroller's reputation-damaging remarks and conduct were made public and the truth and accuracy of the aspersions were challenged by Konski. By reason of the foregoing, Konski's liberty interest was entitled to the constitutional protection offered by the due process clause.

The Comptroller determined that Konski Engineers, P. C. was the target of a Grand Jury investigation solely because the books and records of Konski Engineers, P. C. had been requested by the Grand Jury through a subpoena duces tecum. This conclusion that Konski Engineers, P. C. was under investigation was and is no more than unproven speculation. There is no possible evidence which could have afforded a basis for concluding that an investigation of Konski Engineers, P. C. had, in fact, been undertaken at any time by any Grand Jury (N.Y. Crim. Proc. Law, Section 190.25(4)). The only possible evidence that an investigation existed would have been evidence which anyone party to Grand Jury proceedings is sworn to keep secret (N.Y. Crim. Proc. Law, Section 190.25(4)). Indeed, one of the main purposes of the rule of secrecy is to guard and protect witness. *People* v. *Doe*, 47 Misc. 2d 675, 263 N.Y.S. 2d 607, *aff'd* 24 A.D. 2d 843, 263 N.Y.S.2d 688 (1965).

Moreover, even if the alleged "investigation" could have been proven as a fact, it is not and cannot be indicative of either wrongdoing or guilt, *United States* v. *Dionisio*, 410 U.S. 1, 93 S. Ct. 764 (1973). The assumption of guilt or innocence plays no part in the workings of the Grand Jury:

> "Our whole legal concept of the Grand Jury is that it is not to be engaged in determining the issue of defendant's guilt or innocence but rather being an inquisitional body of citizens charged with the duty under law of conducting its own investigation of all crimes within its jurisdiction without disclosure of its activities and subject only to the requirement relating to the quality and sufficiency of evidence adequate to warrant indictment." *People ex rel Mleczko* v. *McCloskey*, 33 Misc. 2d 175, 226 N.Y.S.2d 202 (Sup. Ct., Chatauqua Co. 1962).

The Grand Jury simply is not a prosecutorial body, People v. Waters, 27 N. Y. 2d 553 (1970).

The mere issuance of a subpoena duces tecum is not proof that the person from whom books and papers are sought is the subject of a Grand Jury investigation. If it were, subpoenas and subpoenas duces tecum would be served only upon Grand Jury targets and not upon mere witnesses. The Grand Jury could not function in its investigative role if this were true.

The Grand Jury does not begin an investigation with an assumption of guilt, rather it begins an investigation using available tools to find evidence. The subpoena is not an accusatory tool, only an investigative tool. National Prosecution Standards, 1st Ed. (1977).

A subpoena duces tecum issues only upon speculation that what is compelled may serve as useful evidence of some criminal activity of some person or agency, Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370 (1906). Application of Inter-City Associates, 207 Misc. 1012, 142 N. Y. S. 2d 412 (Queens Co. 1955). An outsider such as the Comptroller, certainly cannot assume that the evidence is inculpatory, much less that is inculpates a particular individual.

"The compelling of witnesses and books and papers by a Grand Jury need not be preceded by a formal charge against a particular individual", Hale v. Henkel, supra; Blair v. U. S., 250 U. S. 273, 38 S. Ct. 468 (1919); Hendricks v. U. S., 223 U. S. 178, 32 S. Ct. 313 (1911). The books and papers produced by Konski Engineers, P. C. pursuant to the subpoena duces tecum, could have been compelled in hopes of gaining evidence of anyone with whom Konski Engineers, P. C. had conducted business.

In short, even in hindsight, no investigation by the Grand Jury of Mr. Konski or Konski Engineers, P. C. has been shown. The Grand Jury, which two years ago subpoenaed the books and records of Konski Engineers, P. C., has never issued any further subpoenas, nor has it issued any indictments or presentments concerning them.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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APPENDIX

OPINION OF THE NEW YORK COURT OF APPEALS, dated March 20, 1980.

In the Matter of KONSKI ENGINEERS, P.C., et al., Appellants, v ARTHUR LEVITT, as Comptroller of the State of New York, et al., Respondents.

Argued February 11, 1980; decided March 20, 1980

OPINION OF THE COURT

Order affirmed, with costs, for reasons stated in the memorandum at the Appellate Division (69 AD2d 940).

Concur: Chief Judge COOKE and Judges JASEN, GABRIELLI, JONES WACHTLER, FUCHSBERG and MEYER.

OPINION OF THE THIRD JUDICIAL DEPARTMENT, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, dated April 19, 1979.

(April 19, 1979)

1 In the Matter of KONSKI ENGINEERS, P.C., et al., Respondents, v ARTHUR LEVITT, as Comptroller of the State of New York, et al., Appellants, and ERDMAN, ANTHONY, ASSOCIATES, Respondent. -Appeal from that part of a judgment of the Supreme Court at Special Term, entered April 26, 1978 in Albany County, which, in a proceeding pursuant to CPLR article 78, held that the Comptroller's failure to approve Contract II was arbitrary and capricious and referred the matter to a Trial Term for an assessment of damages. In December of 1975, the Department of Environmental Conservation (En Con) requested bids from engineering firms in connection with the rehabilitation, improvement and related channel work on the Warner Dam in Jamestown, New York. The work was to be performed under three consecutive contracts, with the successful bidder on the initial contract having the right to negotiate the second and third contracts. Konski Engineers, P.C. (Konski) submitted a proposal which was selected on March 4, 1976. Although final execution of the first contract was not completed until June 23, 1976, Konski initiated work and completed a majority of it by that time. On February 25, 1977, En Con forwarded the second contract (Contract II) to Konski for its signature. En Con informed Konski that it would take approximately six weeks for the State to execute the contract. In April of 1977, Konski was informed that Contract II had not been approved by the Comptroller. Throughout the latter part of April and May of 1977, the Comptroller continued to refuse to approve the contract and refused to offer any explanation therefor.

OPINION OF THE THIRD JUDICIAL DEPARTMENT, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, dated April 19, 1979.

Konski, nevertheless, continued to work during May and June of 1977, and by July 11, 1977, it had expended some $23,000 of its own funds on the project. On July 11, 1977, En Con informed Konski that the Comptroller would not approve Contract II and that, therefore, En Con intended to solicit proposals from other engineering firms. In October of 1977, En Con entered into an agreement with Erdman, Anthony, Associates (Erdman) to perform the work of Konski under Contract II. In October of 1977, Konski and its president, James L. Konski, P. E., simultaneously instituted two proceedings. The first was an action which sought a preliminary and permanent injunction enjoining the State from paying Erdman. The second was a CPLR article 78 proceeding which sought a judgment directing the Comptroller to approve Konski's Contract II. On November 16, 1977, Special Term denied motions to dismiss both the action and the CPLR article 78 proceeding. The court also denied Konski's motion for a preliminary injunction and mandamus. The parties took no appeal from that decision. The adverse parties in each proceeding thereafter answered, and Konski then moved for summary judgment in each proceeding. Special Term again denied the request for injunctive relief and granted summary judgment to the defendants. With respect to the CPLR article 78 proceeding, the court held that the Comptroller's failure to approve Contract II was arbitrary and capricious and it referred the matter to a Trial Term of the Supreme Court, Albany County, for an assessment of damages. It is this latter decision from which the State appeals. Subdivision 2 of section 112 of the State Finance Law provides that before any contract made by a State agency for over $1,000 is "executed" or becomes "effective", it must "first be

approved by the comptroller and filed in his office." Preliminarily, we hold that where the Comptroller refuses to approve a contract pursuant to this provision, his decision is subject to judicial review to determine whether he exercised his discretion in an arbitrary or capricious fashion (CPLR 7803, subd 3). The State cannot be subject to contractual liability except in the manner prescribed by law. Section 112 plainly requires the Comptroller's approval of contracts executed by State agencies as a condition precedent to State liability (Becker & Assoc. v State of New York, 65 AD2d 65; Blatt Bowling & Billiard Corp. v State of New York, 14 AD2d 144, 146; Westgate North v State Univ. of N. Y., 77 Misc 2d 611, affd 47 AD2d 1004). Konski alleges that although it was aware in early April, 1977 that the Comptroller's approval of Contract II had not been secured, it continued work under Contract II in response to a sense of urgency expressed by numerous officials of local agencies and En Con. However, it is settled law that officers of the State cannot waive provisions such as section 112 (Belmar Contr. Co. v State of New York, 233 NY 189; Long Is. R.R. Co. v State of New York, 185 Misc 646, 648). "We may not ignore the restrictions and limitations with which the legislature has chosen to surround the expenditure of public moneys. They are wise and should be enforced * * * Those dealing with it do so knowing this fact and at their own risk" (Belmar Contr. Co. v State of New York, supra, p 194). Here, Konski not only knew that the Comptroller refused to approve Contract II, but continued to work thereunder despite that persistent refusal. Konski alleges that it continued work with En Con's acquiescence, but however inequitable the conduct of the State may be, it is responsible on a contract only if all

conditions prescribed by law are satisfied (Belmar Contr. Co. v State of New York, supra, p 194). Since the Comptroller has never approved Contract II, under section 112 of the State Finance Law the State is not liable thereon, unless the Comptroller acted arbitrarily or capriciously. Turning then to the next issue raised by this appeal, we hold that the Comptroller's refusal to approve Contract II was not arbitrary or capricious. The record reveals that on June 21, 1976 the Comptroller was served with a subpoena duces tecum to produce before the Grand Jury of New York County all the records and documents of Konski. On March 28, 1977 the Comptroller was requested to provide information to the Special State Prosecutor for Onondaga County who was investigating allegations of political corruption in the award of public contracts, and on April 7, 1977 the Prosecutor requested information with respect to Konski. On the following day, April 8, 1977, En Con submitted Contract II for the Comptroller's approval, and it was in view of this knowledge that the Comptroller refused to approve the contract. Arbitrary and capricious action is one taken "without sound basis in reason and * * * without regard to the facts" (Matter of Pell v Board of Educ., 34 NY2d 222, 231). In view of the knowledge that Konski was under Grand Jury investigation at the time Contract II was submitted to the Comptroller for his approval, we conclude that there was a rational basis for his refusal to approve the contract. Finally, we reject Konski's contention that the Comptroller's discretion under section 112 is limited to determining whether the contract is fair, reasonable, properly executed and there are appropriated funds for the payments required thereby. The statute contains no

OPINION OF THE THIRD JUDICIAL DEPARTMENT, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, dated April 19, 1979.

such limitations, and we find no reason for their imposition. In view of our holding, we do not reach the other issues raised by the parties. Judgment reversed, on the law and the facts, without costs, and petition dismissed. Mahoney, P.J., Greenblott, Staley, Jr., Mikoll and Herlihy, JJ., concur.

OPINION OF THE SUPREME COURT, SPECIAL TERM, ALBANY COUNTY, dated April 5, 1978.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

KONSKI ENGINEERS, P. C. and
JAMES L. KONSKI, P. E.,

Plaintiffs,
Petitioners,

- against -

ARTHUR LEVITT, COMPTROLLER, STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERDMAN, ANTHONY, ASSOCIATES,

Respondents,
Defendants.

(Supreme Court, Special Term, Albany County, February 10, 1978)
(Justice John T. Casey, Presiding)

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OPINION OF THE SUPREME COURT, SPECIAL TERM, ALBANY COUNTY, dated April 5, 1978.

MEMORANDUM

CASEY, J.

In December of 1975, the New York State Department of Environmental Conservation (herein EnCon) forwarded a request for proposals for work to be performed in connection with the design of rehabilitation, improvements, and related channel work on Warner Dam in Jamestown, New York to several consulting engineering firms. The work was to be performed under three consecutive contracts and the successful bidder on the first contract would have the right to negotiate the second and third contracts. Konski Engineers, P. C. (herein Konski) submitted a proposal and some time thereafter was advised that it had been selected for negotiation of the first contract.

Konski began negotiations with EnCon and an agreement was reached subject to the approval of the Comptroller of the State of New York pursuant to the provisions of Section 112 (2) of the State Finance Law. Prior to receiving such approval, Konski, at the urging of EnCon officials, among others, commenced and completed a substantial portion of the work called for under the contract. After the first contract had been completed Konski commenced negotiations with EnCon concerning Contracts II and III. On February 25, 1977, EnCon forwarded Konski Contract II for signature, subject to the approval of the Comptroller. It was signed and returned to EnCon on March 1, 1977. In April, 1977, EnCon advised Konski that the contract had been approved and signed by all State officers except the Comptroller. During May and June of 1977 Konski again, at the request of EnCon and others,

performed certain work under Contract II notwithstanding the absence of final approval by the Comptroller.

On July 11, 1977, EnCon advised Konski that Contract II would not be approved by the Comptroller. Konski repeatedly requested an itemization of the reasons for withholding such approval, but the Comptroller maintained that he was not required to furnish such information. In October of 1977, EnCon entered into an agreement with Erdman, Anthony, Associates of Rochester, New York (herein Erdman) to perform the work of Konski under Contract II. Erdman commenced performing and has completed a portion of the work required under that contract.

In October, 1977, Konski Engineers, P. C. and James L. Konski, P. E. instituted two legal proceedings. In one proceeding they sought preliminary and permanent unjunctive relief against EnCon, the Comptroller and Erdman. Specifically, in that action, Konski and James L. Konski, P. E. sought an order compelling the Comptroller to immediately approve Contract II; enjoining the Comptroller and Erdman from taking certain action in connection with any payment by the State to Erdman pursuant to the contract with Erdman; and compelling the Comptroller to produce certain written material concerning his refusal to approve Contract II with Konski. All of the defendants, except for Erdman, moved to dismiss upon several grounds, one of which was that the complaint failed to state a cause of action because under Section 112 (2) the Comptroller had unfettered discretion to refrain from approving any contract and such action was not subject to judicial review.

OPINION OF THE SUPREME COURT, SPECIAL TERM, ALBANY COUNTY, dated April 5, 1978.

The second proceeding commenced by Konski and James L. Konski, P. E. was an Article 78 Proceeding in the nature of mandamus. In that proceeding, those parties, as petitioners, sought a judgment directing the Comptroller to approve Contract II with Konski and directing such other and further relief as to the court may seem proper. The respondents in that action were EnCon, the Comptroller and Erdman. A motion to dismiss was made upon essentially the same grounds as were advanced in the action for an injunction.

Both motions were heard by Hon. George L. Cobb, Justice of the Supreme Court. Focusing upon the argument that the Comptroller's action were unreviewable, Justice Cobb stated:

> Whatever may be the merits of that assertion in connection with the initial selection of engineering firms which will be invited to negotiate with the State for available public work, this court is not convinced that there can never be any judicial review of the manner in which the State Comptroller exercises the discretionary authority which is his pursuant to Subdivision 2 of Section 112 of the State Finance Law.

Justice Cobb denied the motions to dismiss and refused to grant a preliminary injunction compelling the Comptroller to approve Contract II with Konski and restraining any payments to Erdman. In addition, Justice Cobb directed the plaintiffs to proceed under CPLR 3120 to obtain the materials relating to the Comptroller's failure to approve the contract. No appeal has been taken from the decision.

OPINION OF THE SUPREME COURT, SPECIAL TERM, ALBANY COUNTY, dated April 5, 1978.

In due course, the adverse parties in each proceeding interposed answers. In an affidavit attached to the answer to the petition, the counsel to the Comptroller set forth the reasons why the Comptroller refused to approve Contract II. Specifically, the Comptroller withheld approval because Konski was under investigation by a Grand Jury in Onondaga County and a Grand Jury in New York County in connection with political corruption in the award of public contracts. The Comptroller does not provide any information concerning his understanding as to the degree of involvement of Konski or James L. Konski, P. E. in the matters under investigation. Indeed, when he decided to withhold approval only certain records of Konski and James L. Konski, P. E. in the possession of the Comptroller had been subpoenaed.

Konski and James L. Konski, P. E. now move for summary judgment in the injunction action and for the relief requested in the Article 78 Proceeding. The papers presented substantiate the facts set forth above.

The plaintiffs (Konski and James L. Konski, P. E.) are not entitled to summary judgment in the action for injunctive relief. In a proper case a court may issue an injunction in connection with contractual obligations. 28 N. Y. Jur., Contracts, §78. The present case does not warrant such relief. Significantly, the plaintiffs do not maintain that Erdman in any way conspired or otherwise acted to deprive them of any contractual rights. Matter of Carroll-Ratner Corp. v. City Manager of New Rochelle, 54 Misc. 2d 625, aff'd without opinion, 36 App. Div. 2d 795. Furthermore, this case does not involve a breach of the public bidding requirements or an overpayment of any public

funds. Thus, cases such as Albert Elia Building Co., Inc. v. New York State Urban Development Corp. (54 App. Div. 2d 337) and General Building Contractors of New York State, Inc. v. State of New York (89 Misc. 2d 279) which involve forfeiture of monies received under certain public contracts are inapposite. Finally, injunctive relief does not lie because, as will be developed herein, the plaintiffs have a complete and adequate remedy at law: money damages. E. W. Bruno v. Friedberg, 21 App. Div. 2d 336.

Summary judgment is, therefore, denied to the plaintiffs in the injunction action, and, in accordance with the authority given the court under CPLR 3212 (b), the defendants are granted summary judgment in that action.

The issues presented in the Article 78 Proceeding are more complex. The decision of Mr. Justice Cobb is dispositive of the question concerning the Comptroller's authority under Section 112 (2) of the State Finance Law. Justice Cobb held that the Comptroller's actions are reviewable and that decision is the law of the case. See McKinney's Practice Commentaries, C 3211:70.

The next issue is whether the Comptroller acted in an arbitrary and capricious manner when he refused to approve Contract II with Konski. The petitioners were not the primary targets of the investigation. Indeed, the information requested concerning them was not indicative of any serious dereliction by the petitioners nor did it indicate a substantial likelihood of discovering such conduct. This inconclusive information pales when matched against the petitioners' unblemished conduct, their previous satisfactory

performance under Contract I and their partial performance on Contract II. In sum, the reason advanced by the Comptroller for his refusal to approve Contract II is woefully insufficient. Consequently, such action was arbitrary and capricious. [1]

The most difficult issue is whether the petitioners are entitled to damages in this Article 78 Proceeding. CPLR 7806 provides that a petitioner may recover damages in an Article 78 Proceeding if (1) the damages are incidental to the primary relief sought and (2) the damages are such as the petitioner might recover in an independent and separate action. In Allen v. Eberling, 24 App. Div. 2d 594 the lowest bidder on a public contract awarded pursuant to the public bidding requirements of Section 103 of the General Municipal Law, sought damages in an Article 78 Proceeding against the municipality because it awarded that contract to another. The court held that an unsuccessful bidder could maintain a proceeding to review the award of a contract in violation of a statute requiring that the contract go to the lowest responsible bidder, but could not recover from the municipality the profits which he might have made had his bid been accepted.

---

1. The State was not without a remedy. If after the contract had been approved by the Comptroller the petitioners failed to cooperate with the Grand Juries, the State could have cancelled the contract without incurring any penalty or damage. State Finance Law, §139-a.

OPINION OF THE SUPREME COURT, SPECIAL TERM, ALBANY COUNTY, dated April 5, 1978.

According to the court, damages were not recoverable because the petitioner-bidder did not have a statutory or a common law right to recover such damages in an independent and separate action. Inferentially, however, the court found that if damages had been suffered they would have been incidental to the primary relief sought.

The question is whether the relationship among Konski and some or all of the respondents was such that the arbitrary action of the Comptroller would result in liability for damages. Unlike the petitioner in Allen v. Eberling, Konski was not a mere offeror responding to a public bidding request. Konski had executed a fully negotiated contract with EnCon, had commenced performance thereunder, had not obtained the contract in violation of any public bidding or other such requirements and was not charging an exhorbitant price for the work. In my view, the relationship between Konski and EnCon was such that unless recovery is specifically precluded by statutory or common law, the arbitrary action of the Comptroller preventing Konski's performance under that agreement would entitle Konski to recover damages.

Section 112 (2) of the State Finance Law provides that "before any contract made for or by any state department...shall be executed or become effective, when such contract exceeds one thousand dollars in amount...it shall first be approved by the Comptroller and filed in this office". (emphasis added) Subdivision 2 does not render the relationship of Konski and EnCon wholly nugatory until the Comptroller issued his approval. The Comptroller is not a primary party to the contract and when he arbitrarily

refuses to approve the agreement after performance thereunder has begun Subdivision 2 should not be used to absolve the State from liability.[2] The Comptroller's authority under that subdivision is supervisory in nature and established "to create a check upon the making of extravagant, improvident and improper contracts, to the injury of the State, by its officers and agents". 1915 Op. Atty. Gen. 28, 32. There has been no showing that Contract II with Konski was extravagant, improvident or otherwise improper.

This decision should not be interpreted as authority for the proposition that whenever an administrator exercises his discretion in an arbitrary and capricious manner, damages may be recovered in an Article 78 Proceeding. Obviously, such a rule would unduly inhibit administrative determinations. In the present case, however, the action of the Comptroller was so arbitrary and capricious and the damages caused thereby were so foreseeable that damages are appropriate.

The plaintiffs' motion for summary judgment in the action for injunctive relief is denied and summary judgment in that action is granted to the defendants.

---

2. It should also be noted that this case does not involve a situation where a public work contract was negotiated and executed without any attempt to secure the approval of the Comptroller. In those cases, in order to prevent the abuses at which Section 112 (2) was aimed, the courts have properly held that no contract existed. See e.g., Westgate North, Inc. v. State University of New York, 77 Misc. 2d 611, aff'd 47 App. Div. 2d 1004; Blatt Bowling & Billiard Corp. v. State, 14 App. Div. 2d 144.

OPINION OF THE SUPREME COURT, SPECIAL TERM, ALBANY COUNTY, dated April 5, 1978.

The relief requested in the Article 78 Proceeding is granted to the extent that the failure of the Comptroller to approve Contract II with Konski is declared to be arbitrary and capricious and the matter is referred to the Ready Day Calendar of the Trial Term of the Albany County Supreme Court for a hearing as to the damages suffered as a result thereof.

Submit order and judgment.

Dated: Troy, New York
April 5, 1978.

OPINION OF THE SUPREME COURT, ALBANY COUNTY, SPECIAL TERM, PART I, dated November 16, 1977.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

KONSKI ENGINEERS, P.C., :
and :
JAMES L. KONSKI, P.E., :
Plaintiffs/Petitioners, :
- against - :
ARTHUR LEVITT, :
COMPTROLLER, STATE OF NEW YORK :
and :
ERDMAN, ANTHONY, ASSOCIATES, :
Defendants/Respondents.

(Supreme Court, Albany County Special Term Part I, October 28, 1977. Calendar No. 7)

(JUSTICE GEORGE L. COBB PRESIDING)

APPEARANCES:

MacKenzie, Smith, Lewis, Michell & Hughes, for plaintiffs/petitioners.

Louis J. Lefkowitz, Attorney-General (Robert T. Mulig, of counsel), for defendant/respondent Levitt.

Brennan, Centner, Palermo & Blauvelt, for defendant/respondent Erdman, Anthony, Associates.

OPINION OF THE SUPREME COURT, ALBANY COUNTY, SPECIAL TERM, PART I, dated November 16, 1977.

COBB, J.

Plaintiff/petitioner Konski Engineers, P. C. (hereinafter "Konski, P. C.") and plaintiff/petitioner Konski, individually, have simultaneously instituted an article 78 proceeding and an action for a permanent injunction against the State Comptroller and the engineering firm of Erdman, Anthony, Associates (hereinafter "Erdman"). The petition in the special proceeding and the complaint in the action contain essentially the same allegations and the relief sought in the one would supplement and reinforce the relief sought in the other. Upon a single set of papers, plaintiffs/petitioners now move in both the special proceeding and the action for certain relief and the defendant/respondent Comptroller by cross-moving upon a single set of papers for certain other relief has adopted this somewhat irregular procedure. However, the irregularity will be disregarded pursuant to CPLR 2001 except that, to preserve the integrity of the two separate legal proceedings, separate orders should be entered upon the instant motions in each.

In the respective pleadings, plaintiffs/petitioners allege that heretofore Konski, P. C. and the New York State Department of Environmental Conservation (hereinafter "DEC") negotiated a contract for the performance by the former of certain engineering services; that the terms of their understanding were incorporated in a written agreement which DEC forwarded to Konski, P. C.; that Konski, P. C. was informed by DEC that the said agreement had been approved and signed by all necessary State officers except the Comptroller, who, pursuant to subdivision 2 of section 112 of the State Finance Law, must approve and file in his office agreements such as this before it could

become effective; that prior to July 11, 1977, in response to "a sense of urgency expressed by numerous officials and representatives of concerned local agencies and DEC", Konski, P. C., with the knowledge and acquiesence of DEC, performed certain of the contract work expending in the process from its own funds a sum in excess of $23,000; that on or about July 18, 1977 plaintiffs/petitioners were informed by DEC that the said Comptroller would not approve the aforesaid contract; that at about that time Konski, P. C., in response to a subpoena, "voluntarily" produced virtually all of its business records for a certain three-year period for the inspection of an Extraordinary Special Grand Jury for the County of Onondaga Which was then investigating certain allegations of political corruption in connection with public contract awards in that County; that Konski, P. C. is completely innocent of any wrongdoing whatsoever in connection with such contract awards and that no indictments have been returned against Konski, P. C., or any of its personnel, at any time; that the actual reason for the refusal of the said State Comptroller to approve the said contract was the fact that the records of Konski, P. C. were so subpoenaed; and that DEC has selected, and the Comptroller has approved Erdman as the replacement contractor for the work which Konski, P. C. would have performed if the Comptroller had approved the said agreement instead of rejecting it.

The Comptroller's cross motion seeks dismissal of the petition and complaint, in part, upon a claim that each fails to state a cause of action because "[t]he Department of Environmental Conservation

with the approval of the Comptroller has the absolute authority to negotiate with whichever contractor these State agencies determine to be acceptable". Whatever may be the merits of that assertion in connection with the initial selection of engineering firms which will be invited to negotiate with the State for available public owrk, this court is not convinced that there can never be any judicial review of the manner in which the State Comptroller exercises or fails to exercise the discretionary authority which is his pursuant to subdivision 2 of section 112 of the State Finance Law.

As a part of the common law, public officers are obligated "to perform the tasks of their offices honestly, faithfully, and to the best of their ability * * * " (48 N. Y. Jur., Public Officers and Employees, § 91), and if they abuse their public obligations by actions which are "arbitrary, tyrannical and unreasonable, or * * * based upon false information", the person aggrieved by such actions may invoke the ancient writ which summons the sovereign people of the State of New York to right the wrong (People ex rel. Lodes v. Department of Health of City of N. Y., 189 N. Y. 187, 194; see, also, Matter of Fehlhaber Corp. v. O'Hara, 53 A D 2d 746). Accordingly, this argument of the cross movant must fail.

The cross movant also says that there should be a dismissal because of the failure of the plaintiffs/petitioners to join DEC as a party. The claim that DEC must be so joined is a questionable one (see Matter of Greaney v. Poston, 50 A D 2d 653), but if it be valid, a dismissal upon the ground of nonjoinder

should be ordered only if DEC is a truly "indispensable" party and all of the alternatives to dismissal have been exhausted (Siegel, Practice Commentary, McKinney's Cons. Laws of N. Y., Book 7B, CPLR 3211, C3211:34). Here DEC can readily be added as a party (CPLR 1001, subd. [b], CPLR 1003, CPLR 7802, subd. [d]), and the court will adopt that alternative rather than order a dismissal on the ground of nonjoinder.

The cross motion also seeks dismissal upon the ground that the plaintiffs/petitioners may not maintain the special proceeding because they lack the necessary standing. In support of this claim, the cross movant says that the plaintiffs/petitioners may not challenge the legality of the Comptroller's action unless they were injured and that they were not injured because the Comptroller had a legal right to do what he did. The court is not persuaded by this circuitous reasoning.

Accordingly, the cross motion will be denied except that the court will order that the plaintiffs/petitioners join DEC as a party respondent or defendant in each of these legal proceedings by serving a supplemental notice of petition and a supplemental summons as well as a copy of the appropriate pleading upon DEC personally and upon the Attorney-General personally at his office in Albany not later than five days after the date of the service of a copy of the orders to be entered hereon with notice of entry.

The court now turns to the motion of plaintiffs/petitioners for an order which would (1) compel the Comptroller to immediately approve the subject

contract, (2) preliminarily enjoin the Comptroller and Erdman from taking certain action in connection with any payment by the State to Erdman pursuant to Erdman's contract for engineering work, and (3) compel the Comptroller to produce certain written matter which "in any way touch[es] or concern[s] the decision of the Comptroller's office to refuse approval of the * * * " said Konski, P. C. agreement. Because the ultimate legal relief which is sought may seldom be had upon a preliminary motion and because of the reluctance of courts to delay urgent public projects to benefit private interests, that branch of the motion which seeks relief in the nature of mandamus and in-injunctive relief will be denied (7A Weinstein-Korn-Miller, N. Y. Civ. Prac., ¶¶6301.17, 6301.21). As for that branch of the motion which seeks to compel the Comptroller to produce the aforesaid written matter, the court will enter an order in the proceeding which grants leave to petitioners pursuant to CPLR 408 to seek discovery of specifically designated documents or other things by serving a notice pursuant to CPLR 3120 (subd. [a]) not later than five days after DEC has been joined as a party to the proceeding. In the action, the discovery branch of the motion will be denied without prejudice, however, to plaintiffs seeking discovery of specifically described documents and other things by serving a proper notice pursuant to CPLR 3120 (subd. [a]) at any time after DEC has been joined as a party to the action.

Submit orders on notice.

Dated: November 16, 1977

All papers to attorneys for
plaintiffs/petitioners.

Supreme Court, U. S.
FILED
AUG 19 1980
MICHAEL RODAK, JR., CLERK

[K-105]

No. 79-2002

In The

Supreme Court of the United States

OCTOBER TERM, 1980

KONSKI ENGINEERS, P.C. and JAMES L. KONSKI, P.E.,
Petitioners,

against

ARTHUR LEVITT, Comptroller, State of New York, and NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondents,

ERDMAN, ANTHONY, ASSOCIATES,
Respondents.

BRIEF FOR STATE RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF FOR STATE RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

Copies of the opinions of the Supreme Court, Albany County, Special Term, unreported, the opinion of the Supreme Court, Appellate Division, Third Department, 69 AD2d 940, and the opinion of the Court of Appeals of the State of New York, 49 NY2d 850, are annexed to the petition.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 USC §1254(1).

Question Presented

Were petitioner engineering firm or its principal officer denied any due process rights under the Federal Constitution when the State Comptroller refused to approve petitioner's negotiated contract for consulting services, after becoming aware that petitioner was the subject of inquiry in a grand jury investigation relating to corruption in obtaining public contracts?

Statement of the Case

Petitioner engineering firm proposed to enter into a contract with the New York State Department of Environmental Conservation for consulting services in connection with rehabilitation and modifications to Warner Lake Dam, Jamestown, New York. This contract, identified as Contract II, was negotiated instead of publicly bid, and had been preceded by an earlier contract, Contract I, already performed by such firm.

Contract II was signed by petitioner and returned to the Department of Environmental Conservation (DEC) on March 1, 1977 (DEC had advised petitioner it took approximately six weeks for the State to execute a contract). Subsequently, DEC signed the contract and forwarded it to the Comptroller for approval. Section 112(2) of the State Finance Law requires that before any contract made by a State department shall become effective, it shall first be approved by the State Comptroller. In late April, 1977 and May, 1977 petitioner was advised by DEC that the Comptroller refused to forward an approved contract. Nonetheless, according to petitioner's own admission, during May through June, 1977, petitioner did work on Contract II.

By way of background, in the previous summer the Comptroller's office had been served with a subpoena duces tecum to produce all records about contracts with petitioner before a grand jury in New York County for a criminal investigation. In

the following spring, namely April, 1977, at the same time Contract II was being presented for approval, the Comptroller's office received a request from the special prosecutor of Onondaga County for documents relating to petitioner's contracts with the State. This prosecutor was conducting a criminal investigation involving political corruption in the award of public contracts.

Because of the existence of these investigations the Comptroller's office would not approve this negotiated contract. On July 11, 1977 petitioner was informed in writing by DEC that the contract would not be approved by the Comptroller and that DEC had to solicit other bids to take advantage of available federal funds. On September 16, 1977, petitioner's contract was returned by the Comptroller with a formal refusal to approve. As of September 26, 1977 a replacement firm of Erdman, Anthony selected by DEC was approved by the Comptroller.

Meanwhile, on July 18, 1977 petitioner was served with a subpoena duces tecum to appear before the extraordinary special grand jury of Onondaga County with its records. On August 2, 1977 petitioner Konski did so appear. According to petitioner's account it cooperated fully. No indictment was subsequently returned.

On October 12, 1977 petitioner firm and its president commenced the subject proceeding in State Supreme Court seeking to compel the Comptroller to approve the contract for petitioner. The State Supreme Court, Special Term, initially denied petitioner a preliminary injunction in the nature of mandamus, noting its reluctance to delay urgent public projects to benefit private interests. It did order petitioner to join DEC as a party, which petitioner thereafter did. After argument on the merits Supreme Court, Special Term, held that the Comptroller's refusal to approve was arbitrary and capricious. It indicated that the contract had some effect even without the Comptroller's approval and referred the matter to Trial Term for assessment of damages against the respondents.

The respondents appealed from such judgment. In a unanimous decision the Appellate Division, Third Department, reversed the judgment and dismissed the petition (69 AD2d 940). It held that under State statutory law the Comptroller's approval was a condition precedent to State contractual liability* and that there was no liability unless the Comptroller acted arbitrarily or capriciously. It further held that there was a rational basis for the Comptroller's refusal to approve in view of knowledge of the grand jury investigation. It rejected petitioner's argument that the exercise of the Comptroller's discretion was limited to certain fixed categories. The petitioners then appealed to the Court of Appeals, which in a unanimous decision affirmed for the reasons stated in the Appellate Division decision (49 NY2d 850).

REASONS FOR DENYING CERTIORARI

Petitioner had no protected interest in Contract II which would entitle it to due process rights under the Federal Constitution.

Petitioner here claims rights in relation to a contract that never became effective. As an experienced consultant, petitioner knew that the Comptroller's approval was a definite requirement for such contract. Yet petitioner started performance knowing at the time that the Comptroller refused to send an approved contract.

Furthermore it is respondents' position that petitioner firm had no federally protected due process right to enter into a

*State Finance Law, § 112(2) provides in pertinent part:

> "Before any contract made for or by any state department * * * shall be executed or become effective, when such contract exceeds one thousand dollars in amount, * * * it shall first be approved by the Comptroller and filed in his office."

negotiated consultant contract with the State in the circumstances.

This was not a situation of public advertisement or open competitive bids. *Art-Metal-USA, Inc. v Soloman*, 473 F Supp 1 (USDC, DC 1978), cited by petitioners (Br, p 18), was by contrast a competitive purchase of equipment by the government. Petitioner here states that it was low bidder on the preceding Contract I and the State had declared at the outset that the remaining contracts would be let to the consultant awarded Contract I (Br, p 15). These assertions go beyond the record. Petitioner was successful bidder with its proposal for Contract I services but there was no allegation that it was *low* bidder. Negotiations followed its selection. As for the remaining contracts, there was only an "anticipation", not a declaration, in the original solicitation that they would be given to the same firm.

State Finance Law §112(2) is an extremely important statutory safeguard on State procurement. Recovery based on a contract is denied if the Comptroller's approval pursuant to §112(2) has not been obtained (*Joshua A. Becker, M.D., et al. v State*, 65 AD2d 65, affd 48 NY2d 867 [1980]).

In the case at bar the Comptroller was presented with Contract II for approval and the Special Prosecutor's communication virtually at the same time. The Special Prosecutor's request was not a general one, but was directed at this petitioner firm and principal. His investigation involved alleged political corruption in the award of public contracts. The Comptroller's office obviously regarded negotiated contracts as being in a sensitive category. It simply did not want to approve this one with the cloud it perceived over petitioner.

The Appellate Division found that there was a rational basis for the Comptroller's refusal to approve in view of the knowledge that petitioner Konski was under a grand jury investigation at the time the contract was submitted. The Court of Appeals affirmed.

In our argument below we referred to an assumption of risk by petitioners. Petitioner Konski surely was aware of the requirement of Comptroller's approval because he had been involved in other State contracts. The Court of Appeals of this State has consistently emphasized the necessity of complying with statutory requirements for entry into State contracts (*Belmar Contr. Co. v State*, 233 NY 189 [1922]; *Joshua A. Becker, M.D., et al. v State, supra*).

In their own pleadings petitioners stated that throughout the latter part of April and May, 1977 petitioner Konski was informed by DEC that the Comptroller's office would not forward an approved contract and consistently refused to offer any explanation for the delay to DEC. Nevertheless, according to their own account petitioner firm began work on Contract II in May through June, 1977. The Appellate Division found that petitioner not only knew the Comptroller refused to approve Contract II, but continued to work under it despite that persistent refusal.

Petitioners failed to allege any due process rights in their petition by which they commenced this proceeding. While petitioners claimed a due process liberty interest in petitioner's reputation as a part of their overall argument in the memoranda and briefs below, none of the Courts below felt it necessary to comment on such assertions. (Petitioners also made generalized assertions on due process without specifying a right to contract.)

It is interesting to note that while petitioners now argue the State's failure to provide a hearing was a violation of due process (Br, p 23), the record shows no formal request for a hearing — only inquiries. Nor does petitioner explain how the conduct of a hearing would necessarily be compatible with any grand jury proceedings, if such proceedings were still continuing. Elsewhere petitioner concedes that grand jury proceedings have a rule of secrecy (Br, p 25).

Petitioners did not proceed with urgency in asserting rights here. They were notified by letter in July, 1977 that their Contract II would not be approved. They did not commence this proceeding until two months later in October, 1977. Then, because of adding parties, discovery proceedings and procedural matters, it was not argued until February, 1978, some seven months later. When petitioners were refused a preliminary injunction and later a permanent injunction against award to another firm, they took no appeal.

The right of a private party to obtain personal service contract from the government is not on the same level as the right of an individual to continue in government employment. The State must be given some latitude in deciding whom it will engage for its outside consulting arrangements, see *Perkins v Lukens Steel Co.*, 310 US 113 (1939), which recognized power in the government to determine those with whom it will deal and to fix the terms and conditions on which it will make needed purchases.

And even in a direct employment relationship there are limitations to due process rights held by the government employee. The party asserting the right must show more than a unilateral expectation. Such party must show some "legitimate claim of entitlement" *Board of Regents v Roth*, 408 US 564, 577 (1972).

Furthermore the property right asserted must be grounded in some independent source such as the State law, *id.* It has been recognized that "sufficiency of the claim of entitlement must be decided by reference to State law" *Bishop v Wood*, 426 US 341, 344 (1976).

Petitioner here asserts a "reasonable expectation of a contract which has long been considered a property right subject to judicial protection under New York Law" (Br, p 16). In support of such proposition petitioner cites two cases on the trial court level. Neither of these decisions dealt with a governmental

consultant services contract or a contract requiring a statutorily required approval to become effective.

We ask that petitioner's "reasonable expectation" argument be viewed in light of petitioner's admission that it started work on this contract at a time it had been informed that the Comptroller refused to forward an approved contract. At no time during such period did the Comptroller's office lead petitioner to believe it was approved.

The Court of Appeals has made a conclusion of law that the Comptroller had a rational basis for refusing to approve. Regardless of whether this Court would reach the same conclusion, this is an expression of the highest Court of the State as to what it considers the law to be. The Court of Appeals refused to accept petitioner's argument that as a matter of law the Comptroller's discretion was limited to fixed categories. Furthermore, the Court rejected the petitioner's argument that the Comptroller's approval was a condition subsequent. Instead it held that it was a condition precedent under section 112.

The Court of Appeals' decision on rationality together with its findings as to the applicable State substantive law should not be disturbed, *Henry v Mississippi*, 379 US 443, 446-447 (1965).

In their papers petitioners rely on a "liberty interest" protected by the Fourteenth Amendment to practice one's profession without any unjustified label of "infamy" (Br, p 20). They go on to refer to what was "announced" by the Comptroller in rebidding Contract II (Br, p 22). There was nothing in this record to indicate what, if anything, the Comptroller announced to other consulting firms. Nor did the petitioners furnish any information in their pleadings as to what they now call the "Comptroller's reputation damaging remarks" (Br, p 25). Was this simply advice to DEC, that petitioner's firm was under a grand jury investigation? If so, this remark was an accurate statement.

Petitioners argued below that the Comptroller maintained a complete blanket of silence over his reasons for refusing to approve the contract (see, also, Br, pp 12-13). This is not consistent with petitioner's "publication" argument (Br, p 27).

The right to contract is not absolute (*Nebbia v New York*, 291 US 502, 523 [1933]). It is subject to reasonable restraint in the interest of the public welfare (*Breard v City of Alexandria, La.*, 341 US 622). The Comptroller acted out of concern to have a public project completed. The Comptroller also acted to maintain public confidence in governmental expenditures. Clearly, there were special factors involved in denying this personal services contract to petitioners' firm which was being investigated by a grand jury.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: Albany, New York
August 15, 1980

Respectfully submitted,

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79-2002

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Petitioners,

— *vs.* —

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Respondents,

ERDMAN, ANTHONY, ASSOCIATES,
Respondents.

REPLY BRIEF FOR PETITIONERS

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In The

Supreme Court of the United States

OCTOBER TERM, 1980

No.

KONSKI ENGINEERS, P.C. and JAMES L. KONSKI, P.E.,
Petitioners,

— *vs.* —

ARTHUR LEVITT, COMPTROLLER, STATE OF NEW YORK, and NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, *Respondents,*

ERDMAN, ANTHONY, ASSOCIATES, *Respondents.*

REPLY BRIEF FOR PETITIONERS

PETITIONER'S RESPONSES TO ARGUMENTS FIRST RAISED IN RESPONDENTS' BRIEF

Respondents argue that the commencement of contract performance by Konski Engineers, P.C. (hereinafter "Konski"), at a time when it knew that contract approval was delayed in the Comptroller's office constituted an assumption of the risk of a future due process violation by the Comptroller (Br. pp. 4, 5 and 6). This argument is factually incorrect on the Record. Konski did know in the late spring of 1977[1] that for some unknown reason the state's chief fiscal officer had not approved

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[1] Following Konski's March 1, 1977 execution of the contract, it was executed by four separate officials of the Department of Environmental Conservation (hereinafter "DEC") and an Assistant Attorney General prior to its submission to the Comptroller for approval.

the contract *as of that date.* However, it is uncontested in the Record that until well after the Comptroller's final refusal to approve the contract, Konski had no knowledge whatsoever of the reasons behind either the delay or the eventual refusal. Indeed, as is clearly shown in the record, Konski's first possible suspicion concerning the actual basis for the Comptroller's action could only have arisen one week after Konski was informed of that action, *i.e.*, when Konski itself was served with a subpoena duces tecum. Thus, in the late spring of 1977, Konski had absolutely no reason to believe that the approval delay involved any problem related to Konski, as opposed to State bureaucratic, fiscal administrative concerns of some kind.[2]

Further, Konski's reasonable expectation that it would receive the consulting contract for the second phase of the Warner Dam project was not negated by mere knowledge of some kind of temporary tie-up in the Comptroller's office. For prior to said delay, the contracting agency, DEC, had in fact *already awarded the contract to Konski,* had fully executed it as the contracting agency, and had treated it as an existing contractual relationship. Indeed, the statutory authority utilized by the Comptroller to block the Konski contract and debar it from future contracts, New York State Finance Law Section 112, itself recognizes the post-award nature of comptroller contract review:

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[2] Even assuming, *arguendo,* that Konski had known the reasons for the delay all along, the mere commencement of work on the contract cannot possibly be seen as an assumption of the risk that the Comptroller would issue a final refusal to approve the contract, debar Konski from all State contracting, and injure said firm's reputation, without first apprising Konski of specific charges and providing Konski with an opportunity to be heard in its own defense as due process requires.

> "Before any *contract made* for or *by any State Department* shall be executed or *become effective* . . . it shall first be approved by the Comptroller and filed in his office," (emphasis supplied).

Thus, in 1915 *Op. Atty. Gen.* 28,31, Attorney General Woodbury cautioned the Comptroller that:

> "He (the Comptroller) should keep in mind that he is not one of the contracting parties; that the power of making contracts is not taken away from authorized officers and agents of the State by force of this amendment; (and that) . . . his power is not to be used to prevent the execution of the proper functions of other officers and agents of the State."

In short, this case does not involve a rejection of Konski by the State's contracting agency (DEC) based upon any additional discretion provided that agency through the negotiated procurement process. On the contrary, not only did DEC award Konski the contract *following* actual contract negotiations, it also repeatedly refused the Comptroller's request that it in effect reopen the negotiation process to rescind said award even though it had knowledge of the same facts upon which the Comptroller finally acted. Petitioners submit that Konski's expectation of performing contract work for the government was no less reasonable than the contractor's expectation in *Art-Metal-USA, Inc.* v. *Soloman*, 473 F.Supp. 1 (D.D.C. 1978).

Respondent also argues that Konski somehow waived its constitutional right to due process because it made " . . . no formal request for a hearing -- only inquiries". Petitioners submit that such a request is not a recognized condition precedent to the constitutional requirement that states afford its citizens due process of law before depriving them of their right to property or liberty. Moreover, as was stated above, Konski had no knowledge that anyone questioned its responsibility prior to the Comptroller's final refusal to approve the contract. Thus, it had no reason to request a hearing on its reasonable expectation to receive the Warner Dam Contract II until after it was

surprised by the announcement of an already final agency determination. Due process requires a notice of charges and hearing *prior to* any such final determination (See Petition for Writ of Certiorari, pp. 16-18, and the cases cited therein).[3]

In addition, Konski had no reason to suspect that the Comptroller had debarred it from all state contracting until January 16, 1978, more than six months after Konski had been apprised of the Comptroller's refusal to approve the specific contract at issue. At that time the State released its very first explanation of its refusal to approve the contract at issue, the affidavit of Theodore Spatz, Counsel to the Comptroller, filed in support of the State's Answer to initial Petition herein. Said answer and affidavit were served only after Justice Cobb denied the State's motion to dismiss Konski's Petition, rejecting the State's attempt to block any hearing at all in this matter upon the argument that the State had "absolute discretion" in the area of negotiated procurements which precluded any judicial review thereof.

Finally, the State argues that Mr. Spatz's admission in his affidavit that he " . . . advised the Department of Environmental Conservation that *Konski Engineers was under a Grand Jury investigation*," (emphasis supplied) did not deny Konski a liberty interest because " . . . this remark was an accurate statement". Petitioner vehemently rejects this accuracy defense, and submits that the mere service of a subpoena duces tecum or

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[3] A pre-determination hearing would not, as the State suggests, violate the rule of secrecy concerning grand jury proceedings, because the only fact in the possession of the Comptroller was that a grand jury had subpoenaed Konski - related documents from the Comptroller, and that a Special Attorney General had requested the same documents thereafter. Certainly, Konski's knowledge of said "facts" would not have prejudiced the grand jury's function. Indeed, the grand jury subpoenaed the same records, among others, directly from Konski shortly after the Special Attorney General's request (*See* Petition, pp. 11 and 12).

a request for records does not constitute any evidence whatever that the firm whose records are sought is under an investigation of any kind (*See* Petition, pp. 25-27).[4]

Indeed, this assertion by the State represents one in a long series of crafty attempts to indirectly allege some kind of vague, general misconduct on Konski's part by connecting Konski's name with the general purpose of the grand jury investigation at issue. Thus, after stating in his affidavit that Konski was under grand jury investigation, Mr. Spatz stated that " . . . the criminal investigation involved political corruption in the award of public contracts". Similarly, after noting the special prosecutor's request for Konski - related documents at page 3 of its Brief to this court, respondent states that "(T)his prosecutor was conducting a criminal investigation involving political corruption in the award of public contracts". No charges of such corruption have ever been raised by anyone against Konski; no indictments have been issued against said firm, or its president. This kind of trial by *innuendo* is precisely the evil which the due process clause of the 14th Amendment was designed to prevent.

Finally, the State raises a particularly ingenuous argument at p. 9 of its Brief, stating:

> "Petitioners argued below that the Comptroller maintained a complete blanket of silence over his reasons for refusing to approve the contract (see, also, Br. (sic.) pp. 12-13). This is not consistent with Petitioners' publication argument (Br. (sic.) p. 27)."

Actually, Konski has maintained that the Comptroller kept *Konski* in the dark, failing " . . . to acknowledge the relationship between the Andreoli records request and the Comptroller's refusal to approve the Konski contract," (Petition at pp. 12-13). This selective secrecy did not negate the fact of publication to third parties, as alleged in the Petition. Instead,

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[4] Note also the injurious publication to other consulting engineering firms discussed at pp. 22-25 of the Petition.

it only heightened the damage, precluding possible self-help mitigation efforts by Konski, while at the same time hampering judicial review.

CONCLUSION

For the reasons set forth above and in the Petition herein, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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